

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

32207

**FILE:**

B-219945

**DATE:** September 12, 1985

**MATTER OF:**

Model Industries, Inc.

## DIGEST:

1. Contention that a specification for a brand name or equal product unduly restricts competition involves an alleged defect apparent from the face of a solicitation, and any protest on this basis must be filed before bid opening or the closing date for receipt of initial proposals.
2. Where, in response to a solicitation specifying a brand name or equal product, protester clearly indicates its intention to provide a product that does not conform to the salient characteristics listed in the solicitation, agency's failure to hold discussions with protester or request its best and final offer is not legally objectionable, since discussions would not have cured design and dimensional deviations.

Model Industries Inc. protests the award of a contract to Kennedy Manufacturing Company under request for proposals (RFP) No. FEP-CN-PN3408-N-7-25-85, issued June 25, 1985 by the General Services Administration (GSA) for tool cabinets. Model contends that the purchase description, as written, unnecessarily restricts competition and favors the brand name Kennedy cabinet. The protester also asks why its unit, which was acceptable a year ago, is not acceptable now, and questions GSA's rejection of its proposal without requesting a best and final offer.

We dismiss the protest.

The RFP, which was issued as a total small business set-aside, specified Kennedy model No. 3408 or equal. The solicitation contained the standard clause stating that any

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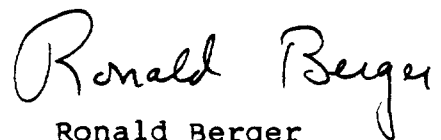
offers proposing "equal" products would be considered for award if the products met the salient characteristics listed in the RFP. Model offered its eight-drawer roller cabinet and indicated that its unit would be in accord with a sketch included with its offer. After reviewing this information, GSA apparently concluded that the unit offered by Model was not an "equal" and therefore rejected it.

Model's contention that the purchase description unnecessarily restricts competition is untimely, since this ground of protest was evident from the face of the solicitation. Under our Bid Protest Regulations, protests based on alleged improprieties in an RFP must be filed before the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1985); Jarrett S. Blankenship Co., B-213473, June 25, 1984, 84-1 CPD ¶ 662. Since Model's protest was not filed until after the closing date, we will not consider this issue.

From the material submitted with the protest, we see that Model offered a cabinet with a width of 34-9/16 inches, whereas the specifications required a width of 34 inches. This exceeded the stated 1/2 inch tolerance on overall dimensions. Further, the specifications required that the drawers operate on 18 gage, 2-piece I beam slides and be capable of being opened to the fully-opened position. The information that Model supplied with its offer, copies of which it also has attached to its protest, does not indicate that the firm intended to furnish 2-piece I beam slides. According to Model's protest letter, the firm intended to furnish a 1-piece slide.

When, in a brand name or equal procurement, precise dimensions or other characteristics are specified, we assume that these are material, and items that are merely functionally equivalent are not acceptable. CFE Equipment Corp., B-203082, May 29, 1981, 81-1 CPD ¶ 426. Here, the 2-piece requirement was a salient characteristic, and Model's failure to indicate compliance with this requirement, along with the slight dimensional deviation, resulted in Model's offer being rejected. In view of the firm's intention, expressed in its offer and its protest letter, to provide a product that was not technically acceptable, we do not believe GSA's failure to conduct discussions with and request a best and final offer from Model is legally objectionable or prejudicial to Model. Clearly, discussions would not have cured the design and dimensional deviations in the cabinet that Model offered.

The protest is dismissed.

A handwritten signature in cursive script that reads "Ronald Berger". The signature is written in dark ink and is positioned above the printed name and title.

Ronald Berger  
Deputy Associate  
General Counsel